Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of	)	
	)	
Michael Radio Group,	)	
Assignor	)	
	)	
and	)	File No. BAPH-20001101ABD
	)	
Clear Channel Broadcasting Licenses, Inc.,	)	
Assignee	)	
	)	
For Assignment of the Construction Permit	)	
of Station KDAM(FM),[1] Hope, North Dakota	)	Facility ID No. 88502

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2004 **Released: December 2, 2004**

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

1. The Commission has before it an Application for Review filed by Monterey Licenses, L.L.C. ("Monterey") on June 25, 2001. Monterey seeks review of the May 24, 2001, decision by the Media Bureau ("Bureau") denying Monterey's petition to deny and granting an application to assign the construction permit of station KDAM(FM) (at the time, KCHY(FM)), Hope, North Dakota, from Michael Radio Group ("MRG") to Clear Channel Broadcasting Licensees, Inc. ("Clear Channel").[2] On July 12, 2001, Clear Channel filed an Opposition to the Application for Review, to which Monterey filed a Reply on July 20, 2001. The Commission also has before it Monterey's January 15, 2002, motion to stay the effectiveness of the Staff Decision and Clear Channel's January 22, 2002, Opposition to the motion. For the reasons set forth below, we deny the Application for Review and dismiss the Motion for Stay as moot.[3]

2. Monterey is the licensee of several radio stations that compete with Clear Channel's stations in the Fargo, North Dakota, market.[4] Monterey reiterates the arguments it made to the staff, as follows: (1) in

[1] The call sign of the subject station was changed from KCHY(FM) to KDAM(FM) effective October 8, 2002.

[2] *See Letter to Paul A. Cicelski, Esq. and Christopher L. Robbins, Esq.* (MMB May 24, 2001) ("Staff Decision").

[3] Monterey moves that we stay the effectiveness of the Staff Decision to preserve the *status quo* and prevent any "irreparable injury" resulting from Clear Channel's acquisition of KDAM(FM) pending final action on the Application for Review. Given our action here denying the Application for Review, we need not reach the motion for stay. *See Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914 n.5 (1990).

[4] Monterey is the licensee of stations KQWB(FM) and KVOX(FM), Moorhead, Minnesota; KLTA(FM), Breckenridge, Minnesota; KPFX(FM), Fargo, North Dakota; and KQJD(AM) and KQWB(AM), West Fargo, North

the Fargo, North Dakota-Moorhead, Minnesota metropolitan area as defined by Arbitron (the "Fargo Metro"), Clear Channel controlled six of the market's fourteen stations, including station KRVI(FM), Detroit Lakes, Minnesota, and was thus already at its statutory ownership limit;[5] (2) an alternative prediction methodology to plot the contour for KRVI(FM) is justified by the anomalous terrain in the area and results in KRVI(FM) being counted against Clear Channel's ownership limit; (3) Clear Channel already controlled 53.2% of the advertising revenue in the Fargo Metro, and thus *any* increase in Clear Channel's market share when KDAM(FM) commenced operations would be problematic; and (4) the Commission's definition of a "radio market" does not comport with economic reality and the KDAM(FM) application should be deferred until the Commission has completed its rule making on defining radio markets.[6] In its Application for Review, Monterey requests that the Commission "reverse the Bureau's decision and deny the MRG/Clear Channel assignment application or at a minimum defer action on the application until the Commission resolves [the issues raised in *Market Definition NPRM*]."

3. The staff correctly rejected Monterey's contention that the KDAM(FM) acquisition violates the numerical limits contained in the Commission's local radio ownership rule. Under the ownership rules then in effect, both the definition of a "radio market" and the number of stations counted as being in that market were based on signal contours, not on an Arbitron-based or other geographic-based methodology. As in its Petition to Deny, Monterey argues that the transaction's compliance with the ownership limits should be evaluated in the context of the Fargo Arbitron Metro, where only 14 commercial stations are listed as "home." In a 14-station market, Clear Channel may only own up to five stations, with up to three in the same service. Monterey's reliance on the Arbitron-defined Fargo Metro to calculate the number of stations in the market is simply misplaced, however. Although the Commission adopted in mid-2003 a geographic-based methodology for stations in Arbitron rated markets,[7] it did not do so until

Dakota. Clear Channel is the licensee of three radio stations licensed to Fargo (KFGO(AM)/-FM and WDAY-FM) as well as three stations licensed to nearby communities: KVOX(AM), Moorhead, Minnesota, KULW(FM), Kindred, North Dakota, and KRVI(FM), Detroit Lakes, Minnesota.

[5] *See* 47 C.F.R. § 73.3555(a) (promulgated pursuant to Section 202(b)(1) of the Telecommunications Act of 1996).

[6] When Monterey filed its Petition to Deny, the Commission's rule making proceeding focusing on radio market definition was pending. *See Definition of Radio Markets*, MM Docket No. 00-224, 15 FCC Rcd 25077 (2000) ("*Market Definition NPRM*"). That proceeding was subsequently incorporated into an omnibus rule making addressing various broadcast cross-ownership and multiple ownership rules. The Commission released its Order in that omnibus proceeding on July 2, 2003. *See 2002 Biennial Regulatory Review, ("Ownership Report and Order"),* 18 FCC Rcd 13620 (2003), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC,* 373 F.3d 372 (2004) (*"Prometheus Remand Order"*), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) (*"Prometheus Rehearing Order"*). The *Notice of Proposed Rule Making* included in the *Ownership Report and Order* sought comment on developing a geographic-based methodology to evaluate local radio ownership in markets not rated by Arbitron, and that proceeding remains pending. On September 3, 2003, the United States Court of Appeals for the Third Circuit, which is hearing the consolidated appeals of the *Ownership Report and Order*, granted a stay of the effective date of the new ownership rules adopted in that *Order,* stating that "the prior ownership rules remain in effect pending resolution of those proceedings." *Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388, slip op. at 3 (3d Cir. Sept. 3, 2003) (*per curiam*). In the *Prometheus Rehearing Order*, however, the Court of Appeals lifted the stay for the local radio ownership rule revisions, including using Arbitron Metro markets to define local markets.

[7] *See Ownership Report and Order, supra,* 18 FCC Rcd at 13725-30 ¶¶ 273-86.

long after the staff had approved (on May 24, 2001) and the parties had consummated (on January 22, 2002) the sale of KDAM(FM). We do not generally apply changes in ownership rules retroactively so as to require divestiture of existing combinations, as suggested by Monterey, and we did not do so when we revised the local radio rule.[8] Thus, examining the subject transaction under the contour-based methodology set forth in the local radio ownership rule in effect at the time of the staff decision, we confirm the staff's finding that the KDAM(FM) acquisition complied with that rule.

4. At the same time that Monterey argues for use of the Arbitron Metro, it reiterates that the Commission should apply an alternative signal contour prediction methodology for one station because the terrain at issue differs widely from that assumed by the normal prediction methodology.[9] Monterey acknowledges that, under the Commission's definition of a "radio market" in effect at the time the subject application was analyzed, Clear Channel's KRVI(FM), Detroit Lakes, Minnesota, is not counted as one of the stations Clear Channel owns in the same market as the subject stations.[10] Use of the alternative methodology, Monterey contends, demonstrates that the principal community contour of KRVI(FM) overlaps that of KDAM(FM) and, thus, that the two stations are in the same "market." Consequently, Monterey argues, Clear Channel's acquisition of KDAM(FM) will exceed both the total number of stations and the number of FM stations permitted under Section 73.3555(a).

5. In declining to consider Monterey's use of an alternative prediction methodology to demonstrate that KRVI(FM) should be considered part of the subject "market" here -- a methodology that would carry Clear Channel over the number of FM stations, but not over the total number of stations, it can own in the market -- the staff stated that it had previously rejected the use of supplemental engineering showings in the context of multiple ownership compliance demonstrations, whether from petitioners[11] or from applicants.[12] Consistent with that precedent, the staff was not persuaded that a departure from the standard prediction methodology was warranted for KRVI(FM). Monterey argues that the staff decisions cited by the Bureau, such as *Battle Ground,*[13] can be afforded little or no weight in light of the Commission's acceptance of alternative contour-prediction methodologies to demonstrate that television stations' signals do not overlap for purposes of applying the multiple ownership rules.

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[8] *See, e.g., id.* at 13807-09 ¶¶ 482-86 (grandfathering existing station combinations). *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-815 (1978) (upholding Commission decision to require divestiture of newspaper/broadcast combinations only in egregious cases).

[9] Monterey indicates that the subject terrain is "quite flat," sloping from the transmitter site to the Red River Valley in which Fargo lies.

[10] Clear Channel's multiple ownership study, using the Commission's prescribed contour-prediction methodology, demonstrates that the contour for KRVI(FM) does not overlap that of any other station proposed to be commonly owned by Clear Channel as a result of this transaction. Clear Channel therefore did not include KRVI(FM) in the defined radio market in this case. Monterey correctly notes that the contours of KDAM(FM) and KRVI(FM), computed according to the standard prediction methodology set forth in 47 C.F.R. § 73.313, are separated by 0.2 kilometers.

[11] *See WIIZ(FM), Battle Ground, Indiana*, 10 FCC Rcd 3159 (MMB 1995) ("*Battle Ground*").

[12] *See WZNY(FM), Augusta, Georgia*, 13 FCC Rcd 9467 (MMB 1998) ("*Augusta*").

[13] *See supra* note 11.

Monterey cites three Commission decisions in cases involving television stations -- *Heritage Media Services, Inc.*, *John H. Phipps, Inc.*, and *Southern Oregon Broadcasting Co.*[14] -- in support of its position.

6. It is our current and express policy not to apply an alternative prediction methodology in the context of evaluating compliance with the local radio ownership rule.[15] In the *Technical Streamlining NPRM,* discussing specifically the point-to-point ("PTP") alternative prediction methodology, we explained our position as follows:

> In instances involving major radio markets, multiple ownership studies often involve dozens of stations. Selective application of the PTP method to some, but not all, stations in a relevant market would invite disputes where contradictory results would occur. Conversely, in light of the sometimes radical differences between PTP calculations and standard predicted contours, utilizing the PTP method for all stations could affect these ownership studies in ways not anticipated when the current multiple ownership rules were adopted. We believe that, in most instances, the use of the PTP methodology could significantly alter the definition of stations included in a particular market and use of this methodology in this context would serve no useful function in administering our ownership policies.[16]

We are unpersuaded that, because we accepted the use of an alternative prediction methodology in the context of the television duopoly rules in *Heritage, Phipps,* and *Southern Oregon,*[17] we must or should do so here. In each of the cases cited by Monterey, the Commission accepted and analyzed an alternative contour prediction showing to determine whether or not there was overlap between two television stations. To determine how many stations are "in" a radio market using alternative contours, we would need to study those contours for dozens of stations.[18] As we stated in the *Technical Streamlining NPRM*, this could affect radio ownership studies in ways not anticipated when the current ownership rules were adopted.[19] We therefore agree with the staff's conclusion that it was not appropriate to accept Monterey's

[14] *Heritage Media Services, Inc.*, 13 FCC Rcd 5644 (1998); *John H. Phipps, Inc.*, 11 FCC Rcd 13053 (1996); *Southern Oregon Broadcasting Co.*, 9 F.C.C.2d 241 (1967).

[15] *See 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, *Notice of Proposed Rule Making and Order,* 13 FCC Rcd 14849, 14865 (1998) ("*Technical Streamlining NPRM*") (seeking comment on a supplemental point-to-point ("PTP") prediction model designed to provide a more accurate prediction of FM radio interfering signal contours and stating our proposal not to allow use of the PTP methodology in multiple ownership showings).

[16] *Id*. In a subsequent order, we deferred adoption of our proposed PTP methodology on the basis of comments raising issues regarding the accuracy and reliability of the proposed signal propagation prediction model. *See 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, *Second Report and Order*, 15 FCC Rcd 21649, 21652-53 ¶¶ 7-9 (2000).

[17] *See supra* note 14.

[18] Monterey proposes the use of an alternative contour analysis only with respect to KRVI(FM). That is exactly the kind of "selective" use which the staff appropriately rejected in *Augusta, supra* note 13.

[19] T*echnical Streamlining NPRM*, 13 FCC Rcd at 14865.

supplemental engineering study demonstrating overlap between KDAM(FM) and KRVI(FM) based on an alternative contour-prediction model.[20]

7. We also disagree with Monterey's claim that the transaction raised antitrust concerns warranting denial or deferral of action on the application. The staff's independent analysis at the time[21] indicated that Clear Channel already controlled stations in the Fargo Metro garnering 53.6% of the advertising revenue share, and that the combined revenue share of Clear Channel and Monterey, the second largest radio owner in the market, was 92.6%. The staff further noted that the post-transaction revenue shares would remain the same: as an unbuilt station, KDAM(FM) had no reported revenue share. Rather, KDAM(FM) constituted new capacity in the Fargo Metro that would provide new choices for listeners and advertisers.

8. Since grant of the subject assignment application, Clear Channel's advertising revenue share has fallen to 50.1%, notwithstanding the addition of KDAM(FM) to its station group in the Fargo Metro, and the combined revenue share of Clear Channel and Monterey has decreased to 90.4%.[22] Although Clear Channel maintains a significant market position in the Metro today, it appears, according to the BIA data base, that Forum Communications, Tom Ingstad, Triad Broadcasting, and Vision Media offer sufficient alternative sources so that advertisers can "buy around" a number of the formats offered by Clear Channel. These opportunities should constrain the ability of Clear Channel to exercise market power against advertisers in the Fargo Metro. Additionally, the rivalry offered by the non-Clear Channel stations should provide an incentive for Clear Channel to compete by pricing its advertising efficiently. Such rivalry may also result in Clear Channel's introduction of innovative advertising services and packages that will improve the overall quality of radio advertising services available in the Fargo Metro. In view of these conclusions, we find that Monterey has not raised a substantial and material question of fact warranting further inquiry on this issue.

9. Monterey's final claim is that staff action on the application was contrary to our pronouncements on deferral in the *Market Definition NPRM*. In support, Monterey cites, *inter alia,* to the following excerpt:

> As a general matter, we will continue to process applications under the existing standards, unless and until they are changed in this proceeding. In cases raising concerns about how we count the number of stations a party owns in a market, however, we will defer decision pending resolution of that issue in this proceeding. As we concluded in the 1998 Biennial Review Report, the

[20] In refusing to accept Monterey's supplemental showing, we do not intend to give premature effect to the proposal in our *Technical Streamlining NPRM* but merely to emphasize that rule making's recognition of existing practice. *See supra* note 15 and accompanying text.

[21] The Commission had not yet adopted the *Order* in which it announced an "Interim Policy" establishing a specific framework for evaluating the competition aspects of proposed radio transactions. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

[22] A number of factors may explain Clear Channel's reduced revenue share, such as, for example, Tom Ingstad's new station KDJZ-FM, which began its operations in the Fargo Metro in 2001, and the improved performance of Forum Communications' WDAY(AM), which rose to become the fourth-highest rated station in the latest ratings period.

> "shifting market definition" in our counting methodology "appears illogical and contrary to Congress' intent."[23]

Monterey argues that the cited language indicates that we will defer action on any case in which, for example, the Commission's computation of the number of stations in a "market" differs from the count listed by Arbitron or BIA.[24] This is incorrect. As explained in the Staff Decision,[25] pending the conclusion of the radio market rule making proceeding, the Commission will defer acting on applications if compliance with the local radio ownership rule depends on the inclusion of certain attributable station interests of the applicant in the total count of stations in the market.[26] There is no such issue in this case.

10. Accordingly, the June 25, 2001, Application for Review filed by Monterey Licenses, L.L.C. IS DENIED, and its January 15, 2002, Motion for Stay IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[23] *Market Definition NPRM,* 15 FCC Rcd at 25082 ¶ 14.

[24] Application for Review at 8.

[25] *See* Staff Decision at 6.

[26] *E.g., Pine Bluff Radio, Inc.,* 14 FCC Rcd 6594 (1999).

DISSENTING STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN

Re: Michael Radio Group, Assignor and Clear Channel Broadcasting Licenses, Inc., Assignee For Assignment of Construction Permit of Station KDAM(FM), Hope, North Dakota

In this case, the majority approves Clear Channel's acquisition of a radio station in a market in which Clear Channel already controls over 50 percent of the market and Clear Channel and the next largest owner together control over 90 percent. Given this extreme level of market concentration, we cannot support grant of this transfer absent additional information on the public interest benefits of the transaction. Yet, here, the majority has not even considered the public interest benefits or harms. We are troubled by the trend toward greater and greater consolidation of the media, particularly in smaller radio markets, and this Commission's acceptance of such levels of concentration with hardly any analysis. For a robust marketplace of ideas to survive, every community deserves to have a diversity of sources of information available to its members - not just those who live in the largest cities. We find that the amount of concentration at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.